A

PP

v.

DENNIS FRANCIS BILLUN

B

HIGH COURT SABAH & SARAWAK, SIBU
RHODZARIAH BUJANG JC
[CRIMINAL APPEAL NO: 42B-03-2009]
3 NOVEMBER 2009

C ***CRIMINAL PROCEDURE:*** *Charge - Amendment of - Whether changes sought for material - Whether allegation against accused remained the same - Fresh consent - Whether required*

CRIMINAL PROCEDURE: *Charge - Amendment of - Introduction of amended charge in written submission of prosecuting officer - Whether improper and prejudicial to accused - Criminal Procedure Code, ss. 158, 159 & 162*

D

The accused was at the material time an assistant Agricultural Officer serving in the Agriculture Department, Julau in the District
E of Sarikei when he was alleged to have committed an offence under the Anti-Corruption Act 1997. The charge originally stated that he had used a delivery order no. NH62758 dated 30 September 2003 which contained false particulars, to wit, that certain goods valued at RM4,911 were received and handed over to one Minah ak
F Landok and Anja ak Rie when infact there goods were never delivered. At the close of the prosecution's case, the prosecuting officer had asked that the court amend the charge and call the accused to give his defence to the amended charge. This request was made in her written submission and in his brief ruling, the
G sessions court judge refused the amendment and ruled that the prosecution had failed to prove a *prima facie* case against the accused on the original charge, thereby discharging and acquitting him of the same. Hence, the prosecution filed an appeal against the said decision.

H

Held (setting aside the order of discharge and acquittal of the Sessions Court; case to be remitted to Sessions Court for prosecution to properly tender amended charge):

I **(1)** The amendment sought for in the original charge was firstly, in respect of the same offence under s. 11(c) of the Act and secondly, in substance, it only changed the documents said to contain the false particulars, the prices of the goods said to be

supplied and the principal of the accused from the Government of Malaysia to that of the Government of Sarawak. These changes, though at first glance, may seem substantial but they were not themselves, material. The allegation against the accused remained the same which was he used these documents to mislead his principal to effect payment to the supplier of the goods when in fact the goods were not supplied. The change of the principal from the Government of Malaysia to that of the Government of Sawarak was not prejudicial to the accused for as a public officer in the service of a state department, not a federal one, his principal was indeed the Government of Sarawak and the mistake was obviously a carelessness on the part of the drafter of the charge. Hence, fresh consent was not required for the amended charge. (para 6)

(2) However, the mode of introducing the amended charge in the written submission of the prosecuting officer was improper and prejudicial to the accused. If after calling all their witnesses, the prosecuting officer was of the opinion that the charge should be amended, the proper way of doing it was to frame the new charge and have it tendered in court and not to sneak it in her written submission. The accused should be given a chance to give his plea on the amended charge and to recall any witnesses for the prosecution for cross examination in order to establish his defence on the amended charge. To deny him of that chance was to cause him a prejudice so severe that it tantamount to a grave injustice (ss. 158, 159 and 162 Criminal Procedure Code). Hence, in the exercise of the court's revisionary powers, this case was ordered to be remitted to the Sessions Court judge and for the prosecution to properly tender the amended charge before him and follow the consequential steps. (paras 9, 10 & 11)

Case(s) referred to:

PP v. Mohamed Halipah Adan [1981] CLJ 92; [1981] CLJ (Rep) 238 HC ***(refd)***

PP v. Oei Hee Koi & Associated Appeals [1967] 1 LNS 132 PC ***(refd)***

PP v. Teng Boon How [1990] 2 CLJ 1033; [1990] 2 CLJ (Rep) 873 HC ***(refd)***

Legislation referred to:

Anti-Corruption Act 1997, s. 11(c)

Criminal Procedure Code, ss. 158, 159, 161, 162, 376

Federal Constitution, art. 145

For the appellant - Muhammad Sinti DPP
For the respondent - Dominique Ng (Lim Hock Chuan & Voon Lee Shan with him); M/s Dominique Ng & Associates, Advocates

Reported by Suhainah Wahiduddin

JUDGMENT

Rhodzariah Bujang JC:

[1] The accused was an Assistant Agricultural Officer serving in the Agriculture Department, Julau in the District of Sarikei when he was alleged to have committed an offence under the Anti-Corruption Act 1997. The charge originally states that he had used a delivery order no. NH62758 dated 30 September 2003 which contained false particulars, to wit, that certain goods valued at RM4,911 were received and handed over to one Minah ak Landok and Anja ak Rie when infact these goods were never delivered.

[2] The prosecution called a total of 13 witnesses and in her submission at the close of it, the learned prosecuting officer asked that the court amend the charge and call the accused to give his defence to the amended charge. This request was made in her written submission and in his brief ruling, the learned Sessions Court judge refused the amendment and ruled that the prosecution had failed to prove a *prima facie* case against the accused on the original charge, thereby discharging and acquitting him of the same. The prosecution has filed an appeal against the said decision, hence this judgment.

Amended Charge

[3] Before I go any further, it is best that I look at the substance of the amended charge. It is under the same section as the original charge ie, s. 11(c) of the Anti-Corruption Act 1997. The goods which were said to have not been delivered were also the same. What was different is that the document which was alleged to contain the false particulars was changed from the delivery order no. NH62758 dated 30 September 2003 to two documents, ie, an invoice and a delivery order from the supplier of the goods, Agricultural Goods Trading Company.

[4] What is also different is that the amended charge omitted the phrase that the goods had been certified as having been received.

[5] The defence submitted and the learned Sessions Court judge agreed that in order to sustain the amended charge, there must first be a fresh consent to prosecute and since none was tendered in this case, the amendment should not be allowed. This issue forms the main crux of the appeal before me for if I agree with the learned Sessions Court judge and the defence's submission, I would have to dismiss the appeal because it is obvious from the evidence of Mr Chan ak Ran (PW11) that the delivery order in the original charge was prepared by the said PW11 and the signature on that delivery order was not confirmed by any witnesses to be that of the accused. Instead, the prosecution's evidence show that the accused had brought the delivery order issued by PW11 to the supplier in this case, Mr. Lee Tung Siong (PW2) who then issued an invoice and a delivery order (the documents mentioned in the amended charge) which the accused signed to signify that the goods were received by him when infact they were not. What PW2 did give to the accused in lieu of the goods was cash of RM4,545 and these two documents were then used to process and PW2 did receive payment for the said goods. These facts form the substance of the amended charge.

Fresh Consent To Prosecute

[6] The issue of fresh consent is necessary here because the learned prosecuting officer in the Sessions Court was not a Deputy Public Prosecutor. If she had been one, then case authorities have decided that there is no need to have a fresh consent prepared. (see *Public Prosecutor v. Mohamed Halipah Adan* [1981] CLJ 92; [1981] CLJ (Rep) 238 and *Public Prosecutor v. Oei Hee Koi & Associated Appeals* [1967] 1 LNS 132 cited with approval in *Public Prosecutor v. Teng Boon How* [1990] 2 CLJ 1033; [1990] 2 CLJ (Rep) 873). However, saying this does not mean that I agree with the defence that the prosecution has to tender a fresh consent to prosecute in respect of the amended charge because the amendment sought for in the original charge is firstly, in respect of the same offence under s. 11(c) of the Act and secondly, in substance, it only changed the documents said to contain the false particulars, the prices of the goods said to be supplied and the principal of the accused from the

Government of Malaysia to that of the Government of Sarawak. These changes, though at first glance, may seem substantial but they are not in themselves, material. The allegation against the accused remained the same which was he used these documents to mislead his principal to effect payment to the supplier of the goods when in fact the goods were not supplied. The change of the principal from the Government of Malaysia to that of the Government of Sarawak is not prejudicial to the accused for as a public officer in the service of a state department, not a federal one, his principal is indeed the Government of Sarawak and the mistake was obviously a carelessness on the part of the drafter of the charge. I therefore agree with the learned Deputy Public Prosecutor that fresh consent is not required for the amended charge.

[7] I would however allow the appeal on a different ground and though it is one not canvassed in the petition of appeal but is a ground which is manifest on the record and for which my revisionary powers is meant to correct.

Improper Introduction Of The Amended Charge

[8] It is my view, after perusing the record of appeal that the mode of introducing the amended charge in the written submission of the learned prosecuting officer was improper and prejudicial to the accused.

[9] If after calling all their witnesses, the prosecuting officer was of the opinion that the charge should be amended, the proper way of doing it is to frame the new charge and have it tendered in court and not to sneak it in her written submission.

[10] The purpose of doing so is to give the accused a chance to give his plea on the amended charge. It must therefore follow that the amended charge (which, once tendered, must be marked by the court as a prosecution exhibit) be read to the accused and his plea be recorded by the court. If he chooses to plead guilty, the usual procedure on mitigation and sentencing would follow but, and this is the crucial point I wish to make, if he chooses to maintain his earlier plea of not guilty, he must be given the chance to recall any witnesses for the prosecution for cross-examination in order to establish his defence on the amended charge or he could apply to have the trial on the amended charge be adjourned to another date

to facilitate the preparation of his defence to the amended charge. To deny him of that chance is to cause him a prejudice so severe that it tantamounts to a grave injustice. The above steps which I have outlined are not of my own creation but are statutory provisions in the Criminal Procedure Code ie, ss. 158, 159 and 162 thereof. In fact, if fresh sanctions to prosecute is required for the amended charge, the court can, under s. 161 of the Criminal Procedure Code adjourn the trial pending the said sanction. Although the section talks of sanction, in my view, it applies equally to consent.

[11] Therefore, although I allow the appeal in that I agree to set aside the order of discharge and acquittal of the learned Sessions Court judge but, I will not order the accused to give his defence to the amended charge. What I would order instead, in the exercise of my revisionary powers, is for the case to be remitted to the Sessions Court judge and the prosecution to properly tender the amended charge before him and follow the consequential steps which I mentioned earlier. Since by consent of all the parties this decision is delivered in Kuching, I order that the case be mentioned before the Sessions Court judge in Sibu this Friday, 6 November 2009 at 9am.

[12] One last point before I conclude. When I delivered the oral judgment in this case, Mr. Dominique Ng for the accused wanted clarification on this point, which is, whether if the prosecution tendered an amended charge, must the court accept it? I have given my answers to him which I will now amplify. The clear position in law spelt out in s. 376 of the Criminal Procedure Code and read with art. 145 of the Federal Constitution is that the Public Prosecutor has the control and direction of all criminal proceedings under the Code. The institution of a charge is therefore at his discretion and reading the aforesaid provisions with that of s. 158 of the Criminal Procedure Code which gives the court the discretion to amend a charge anytime before judgment, the Public Prosecutor has the power to tender an amended charge anytime before judgment but bearing in mind that under s. 158, the word used is 'may', in exceptional cases the court can refuse to amend the charge. This is when to do so would severely prejudice the accused, for example, when his right to recall a witness is inexercisable due

A to the death of the witness or his attendance could not be procured without great expense and delay. Otherwise, when fair opportunity is available to the accused to recall any particular witness(es) and prepare his defence to the amended charge, I fail to see why the court should interfere with the discretion of the public prosecutor to
B prefer an amended charge against the accused.

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